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No. 182

In the Supreme Court of the United States

OCTOBER TERM, 1959

PATRICIA I. BIRNEL, *Appellant*,

vs.

THE TOWN OF FIRCREST, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

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Seattle 4, Washington

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OCTOBER TERM, 1959

PATRICIA I. BIRNEL,	*Appellant*,	No. 182
vs.		
THE TOWN OF FIRCREST,	*Appellee*.	

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

On October 12, 1959, this court entered an order dismissing the appeal for want of a substantial federal question.

Inasmuch as the complaint challenges Ordinance No. 323 of the Town of Fircrest on the sole ground that it deprives appellant of her liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, the question is clearly federal. In concluding that the question is not substantial, the court erred.

The question is the extent to which governmental authority may dictate and supervise the prevention and treatment of *non-communicable* diseases.

The ordinance here before the court authorizes putting fluoride ion in the public water supply in the hope of reducing the incidence of dental caries. The prin-

ciple inherent in the question is the legality of putting any substance in public water supplies for the purpose of preventing or curing diseases, as distinguished from rendering water pure and wholesome for human consumption.

It is admitted for the purposes of this litigation that:

1. the fluoride is placed in the water to affect the bodies of those drinking the water in the hope of reducing the incidence of dental caries;

2. dental caries is not a communicable disease;

3. the effects of drinking fluoridated water are incompletely known; but it is known that a pathological condition known as mottled enamel habitually affects the enamel structure of the teeth of some children consuming water containing fluoride in the authorized concentration; and

4. the intended benefits of fluoride may be obtained by those desiring them, through bottled water containing fluoride in prescribed amounts, in tablet form and in many other ways and that *such methods which permit control of dosage for each individual are safer and more reliable than adding fluorides to the public water supply* (Tr. 3-4).

No other case has presented such a factual situation to this court.

The Supreme Court of Indiana held that a complaint alleging those facts stated a cause of action, *Tecter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158. The New Brunswick Supreme Court and the Su-

preme Court of Canada reached the same conclusion, *The Queen v. Fredericton* (1955) 2 D.L.R.(2d) 551; *Municipality of Metropolitan Toronto v. Village of Forest Hill* (1957) 9 D.L.R.(2d) 113.

In his classic work on the Police Power, Freund says in section 143:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint requirement in proportion to the danger? *it is* [*sic*] *possible to secure the object sought without impairing essential rights and principles?* does the choice of a particular measure show that some other interest than safety or health was the actual motive of the legislature?" (Emphasis supplied)

The only answers to these questions possible under the pleadings require reversal of the judgment in the instant case.

The refusal of this court to consider this case on its merits leaves unimpaired a six-to-three decision of the Supreme Court of Washington which stands as authority for injecting into public water supplies any substance the legislative authority deems good for people at the moment.

As pointed out in appellant's statement as to jurisdiction, pages 22-23, experiments were conducted as early as 1927 with iodization of public water supplies to prevent goiter. The decision of the Supreme Court of Washington in this case, if not reversed, furnishes

ample precedent for just such experimentation with any substance to treat any condition.

Subjecting people against their will to a mass treatment for non-communicable diseases when individual means of treatment are readily available, economical, safer and more effective would seem to raise a question of deprivation of liberty without due process of law which is at least entitled to consideration on its merits.

Respectfully submitted,

ALFRED J. SCHWEPPE
MARY ELLEN KRUG
FREDRIC C. TAUSEND
Counsel for Appellant.

CERTIFICATE OF COUNSEL

Alfred J. Schweppe, one of counsel for appellant, hereby certify that the above petition for rehearing of this cause is presented in good faith and not for delay.

ALFRED J. SCHWEPPE
Of Counsel for Appellant.